IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JIEFU MA, and XIAOSONG WANG, Plaintiffs, v. PAUL PINEAULT, and ALEXIS PINEAULT, Defendants.	)))))))))))	C.A. No. CPU4-10-002256

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MEMORANDUM OPINION AND ORDER
ON COMPLAINT OF PLAINTIFFS JIEFU MA AND XIASONG WANG

Submitted: January 13, 2012
Decided: April 10, 2012

FLICKINGER, J.

This is an action for breach of contract, fraud, fraudulent misrepresentation, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing. This action arises out of an alleged real property sales agreement between Plaintiffs Jiefu Ma ("Mr. Ma") and Xiasong Wang ("Ms. Wang"), and Defendants Paul Pineault ("Mr. Pineault") and Alexis Pineault ("Mrs. Pineault"). On October 20, 2011, and December 12, 2011, trial was held in this matter. This is the Court's Decision After Trial. For the following reasons set forth below, the Court is entering judgment in favor of Plaintiffs Mr. Ma and Ms. Wang.

I. Procedural History

On March 30, 2010, Mr. Ma and Ms. Wang filed an action for breach of contract, fraud, fraudulent misrepresentation, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing against Mr. and Mrs. Pineault. On February 24, 2011, Mr. and Mrs. Pineault filed an Answer to the Complaint.

On October 20, 2011, and December 12, 2011, the Court held a trial on the Complaint filed by Mr. Ma and Ms. Wang. The Court heard testimony from nine witnesses – Mr. Pineault, Bjorn Haglund, Richard Hartnett, Mrs. Pineault, Stephen Green, Juliet Wu, and Mr. Ma on behalf of the plaintiffs, and Karen Kolek, Joseph Rizzo, Earl Smith, Mr. Pineault, and Mrs. Pineault on behalf of the defendants. The Court admitted a multi-tabbed joint exhibit binder, two documents, and one package of photographs into evidence at trial. At the conclusion of the plaintiff's case in chief, the defendant moved for a directed verdict. The Court denied defendant's motion for directed verdict. At the conclusion of trial, the Court ordered the parties to submit post trial memoranda to supplement closing arguments.

II. Facts

In 1999, a home was built on a lot located at 104 Clear Creek Drive, Bear, Delaware 19701 ("104 Clear Creek" or the "home"). Mr. and Mrs. Pineault became interested in purchasing the home in 2001. Mrs. Pineault testified that from the time the home was built in 1999 until the time the Pineaults became interested in buying the home, the home was used by the builder as a model home.

Mr. and Mrs. Pineault testified that they purchased 104 Clear Creek in 2001. Mrs. Pineault testified that when they purchased the home, the real estate agent told her that during the time the home was used as a model home, the dining room windows leaked. However, Mrs. Pineault testified that the realtor also told the Pineaults that the windows had been repaired and the windows had not leaked since these repairs. She also testified that before the Pineaults purchased the home, the realtor replaced the carpeting in the home. Mrs. Pineault was unable to recall whether the carpet was replaced because of water damage caused by the leaking dining room windows, or because of high foot traffic attributable to the home being used as a model. Mrs. Pineault further testified that the Pineaults never replaced the carpet during the time they lived at 104 Clear Creek. On cross examination, Mrs. Pineault admitted that when the Pineaults purchased the home she knew that there had been water leaks in the basement and living room, but she never personally observed these leaks.

Mr. Pineault testified that before the Pineaults purchased 104 Clear Creek, the realtor told them that there had been an issue with water in the front of the dining room or living room "near the windows." He testified that the realtor told him that both the carpeting and padding beneath the carpeting in the "front rooms" was replaced. He also stated that neither the seller nor realtor provided documentation for these repairs.

On the second day of trial, Mr. Pineault testified that before the Pineaults purchased the home, the realtor told Mrs. Pineault that there had been issues with water leaks in the home. He testified that he was aware that there had been water leaks "down the basement wall." He also testified that he was not worried about these issues when they bought the home because the home was inspected before the Pineaults purchased the home both by a qualified inspector and by a New Castle County government inspector. Mr. Pineault testified that the Pineaults also personally inspected the home twice before closing. He also stated that at this time there was no evidence of water leaks on the basement wall, but the basement ceiling beams and rafters were discolored. Mr. Pineault further testified that the stains he observed at the time the Pineaults purchased the home were identical to the stains shown in photographs taken by Ma during the repairs of 104 Clear Creek at issue in this case.[1] In other words, the stains did not change in color, size, or character during the time that the Pineaults lived in the home. Mr. Pineault also stated that he never observed water stains or active leaking on the basement walls before the Pineaults purchased the home or during the time they owned the home.

Mrs. Pineault testified at the second day of trial that the carpeting in the living room and dining room of the home was replaced before the Pineaults purchased the home. She testified that the builder replaced the carpet because the home had been a sample home. She testified that she personally observed the old carpet before the Pineaults purchased the home. Mrs. Pineault further testified that during this inspection she did not observe any water stains on the old carpet, but did notice that the carpet was worn and dirty. She also stated that before the Pineaults purchased the home, the dining room windows were repaired. Mrs. Pineault testified that before the Pineaults purchased 104 Clear Creek, she did not observe water stains on the basement wall of the home similar to the stains visible in photographs taken by Ma during the repairs of the

[1] Joint Exhibit Tab #9, Ma 105-06.

home.[2] Further, that there were dark spots visible on the sub floor of the basement before the couple purchased the home.

a. The Pineaults' Ownership of 104 Clear Creek Drive.

On October 20, 2011, Mr. Pineault testified that during the time the Pineaults owned 104 Clear Creek Drive, they only had one issue with water. He stated that the basement flooded sometime in 2004 during a major storm. Further, that during this storm, the sump pump in the basement failed and the French drain backed up. He also testified that the Pineaults filed a claim with their insurance company for the damage caused during this storm, that this incident was the only water problem the couple experienced during the time they lived in the home, and that the basement flooded, as a result of the hurricane.

On cross examination, Mr. Pineault admitted that after the instant lawsuit was filed, he contacted his insurance company. Mr. Pineault also admitted that a letter from his insurance company, State Farm, indicated that Mr. Pineault told State Farm representatives that there was prior water leakage when the Pineaults owned 104 Clear Creek Drive, causing the damage at issue in this case. Mr. Pineault stated that he was referring to the flooding that occurred during the hurricane.

Mr. Pineault testified that during the time the Pineaults owned the home, they made numerous improvements to the home, including: (1) replacing the front door; (2) installing grating around the outside walls of the home; (3) replacing the gutters; (4) painting the stucco front of the home; (5) repainting every room in the home at least once; (6) building a sunroom in the back of the home; (7) installing new carpet in the family room; (8) re-caulking the front windows; (9) installing a new back door; (10) installing an elaborate home theatre in the basement and; (11) installing a portico over the front door. Both Mr. and Mrs. Pineault testified

[2] Joint Exhibit Tab #9, Ma 105-06.

that these repairs were not motivated by water issues in the front stucco wall of the home, basement ceiling, or basement wall. Rather, both Mr. and Mrs. Pineault testified these repairs and improvements were motivated entirely by aesthetics.

Mrs. Pineault testified more specifically about each of these repairs. She explained that the grating was installed around the home because when it rained, the Pineaults had problems with water pooling around a transformer in the backyard. Further, that shortly before the Pineaults sold 104 Clear Creek Drive, they installed rocks around home to draw water away from the dining room window area.

Mrs. Pineault testified that the Pineaults replaced all of the gutters on the home. She explained that this was necessary because a helicopter had made an emergency landing in a field behind the backyard of 104 Clear Creek in response to an injured child. She stated that when the helicopter landed on the field she was in the backyard of the home grilling and watching her two dogs. She also stated that the wind from the helicopter was so strong that "the chicken blew off the grill", "it pinned her dogs to the ground", and the gutters in the back of the home "fell down". She further stated that her neighbors' home was also damaged by the helicopter. Specifically, Mrs. Pineault testified that some of the gutters and siding on the back of the neighbors' home was "ripped off."

However, on the second day of trial, Mr. Pineault testified that the gutters were not physically knocked down off the house by the force of the helicopter's wind gust. Rather, that the helicopter caused the nails attaching the gutters to the home to become loose. He stated that after the helicopter incident, he re-hammered these nails to correct the problem. However, over time, the nails again became loose and then he decided that, rather than continue to re-hammer

the nails, the gutters should be replaced. On cross examination, Mr. Pineault explained he only replaced the gutters on the back of the home.

Mr. Pineault testified that the front door was replaced in 2002, shortly after the Pineaults purchased the home. Mr. and Mrs. Pineault both testified that the door was replaced for aesthetic reasons. Mrs. Pineault testified that the old door was not water damaged when it was removed. Mrs. Pineault also testified that she installed the front portico because she "likes porticos".

Mr. Pineault testified that he and Earl Smith ("Smith") built a room inside the basement, and a large movie theatre within. He said that during the construction of this room, he and Smith had to "fish" wires for the electronics through the walls and did not notice water or water stains while performing this work. Mr. Pineault said that he would not have installed a movie theatre in his basement if he knew there were water issues in the basement.

Mr. Pineault testified that during the time the Pineaults owned the home, they had one issue with termites in either 2007 or 2008. He testified that when he discovered the problem he hired a termite technician. The termite technician treated the affected area, the basement ceiling, and removed insulation that was covering this area so that the Pineaults could easily monitor the area for further termite issues. Mr. Pineault stated unequivocally that the insulation was not removed to monitor water issues. Further, that when the insulation was removed, he physically touched the insulation and it was dry. On cross examination, Mr. Pineault stated that it was coincidental that the area where the insulation was removed was the same area later discovered to be severely damaged by water. Mrs. Pineault said that she did not recall when the termite inspection and treatment took place, or when the insulation was removed because "[Mr. Pineault] took care of those issues."

Mr. Pineault testified that during the time the Pineaults owned the home, he observed that there were stains in the corners of the basement wall consistent with the photographs taken by Mr. Ma during the repairs at issue in this case. Further, that he never observed water or water stains on the basement wall.[3] Mr. Pineault admitted that during the time the Pineaults lived in the home, he noticed that a piece of wood in the door frame surrounding the front door of the home was water damaged and discolored. Mrs. Pineault testified that she also noticed water damage on this piece of wood in the foyer. Nonetheless, Mr. Pineault testified that he never checked the discolored portion of the basement ceiling immediately below the front door to see if it was wet. He further testified that he never observed any wetness or stains on the carpet or walls below any of the windows or on any of the windowsills in the living room or dining room windows.

Mr. Pineault testified that in 2008, the Pineaults had the windows on the front stucco wall of the home re-sealed, the stucco wall repainted, and the shutters surrounding the windows on the front wall of the home replaced. Mr. Pineault testified that this work was done at the recommendation of Vincent Rizzo, a family friend. Mr. Pineault testified that the painting was done for aesthetic reasons. He stated that the stucco was not repainted to conceal water stains. Mr. Pineault further testified that the windows were re-sealed because he thought that it would be convenient and prudent to do so when the wall was painted. Mrs. Pineault testified that when the Pineaults moved into the home, the stucco was painted a "beachy gray color" with blue shutters. Mrs. Pineault testified that she did not like this color scheme so she had the stucco painted "almond" and installed black shutters. She said that these repairs were in no way motivated by

[3] Joint Exhibit Tab #9, Ma 105-06.

water problems. Mr. Pineault testified that the Pineaults never noticed that there were any holes in the stucco walls of the home.[4]

Mrs. Pineault testified that in 2009, the Pineaults decided to sell 104 Clear Creek Drive because she suffered an injury to her neck and was not able to take care of the home. Mr. Pineault agreed that they decided to sell the home because Mrs. Pineault had trouble maintaining the home because of the neck injury. While Mr. Pineault admitted that the home they moved into after selling 104 Clear Creek was only fifty square feet smaller, he felt that the new home "feels much smaller." He said that during the eight years the Pineaults lived in 104 Clear Creek Drive, Mrs. Pineault handled the vast majority of the housekeeping and was a "meticulous housekeeper." Mrs. Pineault explained that the new home has fewer floors than 104 Clear Creek, lower ceilings, was built on a much smaller plot of land, has smaller windows and a laundry room on the second floor. She admitted that the new home is still very large and difficult to maintain, but stated that it is more manageable than 104 Clear Creek. She said that they did not move out of 104 Clear Creek for financial reasons.

Mr. Pineault testified that during the eight years the Pineaults lived in 104 Clear Creek Drive, they were not aware of anyone else in their neighborhood having water issues in their home. He specifically testified that he never discussed water issues in 104 Clear Creek with any of his neighbors or friends, and that none of his neighbors discussed water issues in their homes with him.

Mr. Pineault testified that their dogs often looked out of the living room and dining room windows, because the dogs were small and the windows were low to the ground. Mr. Pineault later testified that he never noticed staining on the dining room or living room windows or the connected window sills during the time they lived in the home. However, if there were stains in

[4] Plaintiff's Exhibit # 2, Photograph # 8.

this area, they might be attributable to the dogs' regular use of the area. Mrs. Pineault also testified that the carpeting underneath the dining room and living room windows were heavily worn because the dogs frequently sat in this area. One of her dogs had a kidney issue that caused him to regularly have accidents. She testified that she had purchased three carpet steamers during the time they owned the home to clean up messes caused by the dogs under these windows.

Karen Kolek ("Ms. Kolek") testified that during the entire time the Pineaults owned 104 Clear Creek Drive, she lived at 107 Clear Creek Drive, across the street. Ms. Kolek testified that she is very good friends with the Pineaults. She testified that during the time the Pineaults owned 104 Clear Creek Drive, she spent a significant amount of time in their home. Also, for approximately two and one half years, Ms. Kolek watched the Pineaults dogs on Monday through Friday while the Pineaults were at work.

Ms. Kolek stated that, on days when she watched the Pineault's dogs, she was in the home up to three times per day. She said that while she was in the home, she entered nearly every room in the home, including both the finished and unfinished portions of the basement. Ms. Kolek estimated that during these two and one half years, she entered the basement approximately once or twice per month, and that she never noticed water leaking down the basement walls or smelled mold in the basement.

Ms. Kolek further testified that in 2009, she helped the Pineault's move out of 104 Clear Creek, including moving things out of the basement. She said that she had never seen water, smelled mold, or observed evidence water damage anywhere in the basement of the home, including the discoloration and staining on the basement.[5] Ms. Kolek admitted that she would

[5] Joint Exhibit Tab #9, Ma 105-06.

not have looked for discoloration and staining in the basement ceiling. Also, she admitted that she had never seen any areas in the basement ceiling that were missing insulation.

Ms. Kolek testified that there was a "haircutting station" in the basement. Also, that the Pineaults stored a large amount of bedding and blankets in plastic bags next to the basement wall immediately beneath the front door. She stated that when the Pineaults moved out of 104 Clear Creek Drive, Mrs. Pineault allowed her to go through the bedding and blankets to see whether she wanted to take any, and that all the bedding and blankets were dry and undamaged. Ms. Kolek said that the bedding and blankets did not cover the entire wall beneath the front door. She also testified that there was a "fitness station" against the basement wall.

Additionally, Ms. Kolek opined that Mrs. Pineault maintained the home in "pristine" condition and that there was "never anything out of place in the home." Further, that the Pineaults painted all the walls on the inside of the home and re-wallpapered the walls on more than one occasion.

On cross examination, Ms. Kolek stated that the Pineaults replaced the carpet in either the dining room or the living room at some point during the time they lived in the home. She explained that, while she was not sure in which of the two rooms the Pineaults replaced the carpet, she was certain that they replaced the carpet in one of those two rooms.

Ms. Kolek testified that she remembered when the helicopter landed behind 104 Clear Creek Drive. Ms. Kolek did not recall whether the helicopter damaged the home. Ms. Kolek stated that the gutters and fascia on her home were once "ripped off" by the wind and that she knows that other homes in the neighborhood have had similar issues with gutters and fascia becoming loose or detached.

Ms. Kolek testified that water leaked through the front door of her home and caused some wood rot in the doorway. She said that she had never discussed this water issue with either Mr. or Mrs. Pineault. She said she knew that several other homes in the same neighborhood had issues with water leaking in through the doorways. She stated that all of these homes were part of a planned neighborhood built by the same builder. Ms. Kolek said that she was not aware of any homes with water leaking issues related to the windows. She stated that the Pineaults never told her that they had issues with water at 104 Clear Creek Drive.

Joseph Rizzo ("Mr. Rizzo") testified that he has been employed by JVR Construction Company for thirty years. He said that he has been a friend of the Pineaults for over twenty five years. Mr. Rizzo stated that, based on his experience in performing masonry and stucco work in the construction industry, he is familiar with the signs of water damage in a home. Further, that he has visited 104 Clear Creek approximately four or five times for social visits.

Mr. Rizzo testified that on at least one occasion, he inspected 104 Clear Creek and did not observe any signs of water damage, including stains or mold. He admitted that, despite characterizing this visit as an "inspection," he did not closely inspect the windows, the walls immediately surrounding them, or the window sills. He said that the purpose of this inspection was to look at "the structure of the house," "the construction of it," and later said that his inspection had "no purpose…just to make sure everything was done properly." Mr. Rizzo later explained that Mrs. Pineault asked him to inspect the foundation of the home and specifically, to inspect the basement and the stucco front wall of the home.

On cross examination Mr. Rizzo testified that he had never specifically visited the home to inspect the walls or foundation. Mr. Rizzo testified that no insulation was missing from the

basement during any of the times he visited the home. Also, he could not recall the dates of his visits. He testified that he had never performed any construction work on 104 Clear Creek.

Earl Smith ("Mr. Smith") testified that he works as a carpenter for DiSabatino Construction. Mr. Smith testified that he has been a friend of the Pineaults for over thirty years. Mr. Smith testified that he had performed a substantial amount of construction and carpentry work on 104 Clear Creek during the time the Pineaults lived in the home. He stated that he built an archway in an entrance between two rooms, removed a railing, installed the new back door, and built custom cabinets for the basement home theatre.

Mr. Smith said that when he visited the home socially that he was frequently in the basement watching movies and working out. He testified that he had never observed water in the basement, and that he would not have built wooden cabinets for the entertainment system if he knew that there were water issues in the basement. He also testified that he had never observed any insulation missing from the basement ceiling, stains or discoloration in the basement ceiling.[6] Further, he testified that he had never observed water or water stains near any of the windows or window sills.

On cross examination, Mr. Smith denied meeting Pineaults' counsel Robert Goldberg ("Mr. Goldberg") prior to the time of trial. Mr. Smith even denied meeting Mr. Goldberg on re-direct examination conducted by Mr. Goldberg. Mr. Smith also emphatically testified that he had never discussed the facts of the case or potential questions with the Pineaults prior to trial. On re-direct examination Mr. Smith specifically denied meeting with Mr. Goldberg prior to trial in the Pineault's home. Mr. Pineault later testified that Mr. Smith, in fact, did meet with Mr. Pineault and Mr. Goldberg prior to trial. Mr. Pineault explained that Mr. Smith was confused by this line of questioning.

[6] Joint Exhibit Tab #4, Ma 28.

b. The Seller's Disclosure Form and the Agreement.

On September 7, 2009, the Pineaults completed and signed the "Seller's Disclosure of Real Property Condition Report" (Seller's Disclosure Form").[7] The Pineaults answered the following relevant questions as stated:

> 44. Are there any drainage or flood problems affecting the property? [No]
> …
>
> 53. Is there any movement, shifting, or other problems with walls or foundations? [No]
>
> 54. Has the property or improvements thereon ever been damaged by fire, smoke, wind, or flood? [No]
> …
>
> 57. Is there any past or present water leakage in the house? [Yes]
> …
>
> 59. Are there any repairs or other attempts to control the cause or effect of any problem described above? [No]
> …
>
> 66. Is there any water leakage, accumulation, or dampness within the basement or crawlspace? [No]
>
> 67. Have there been any repairs or other attempts to control any water or dampness problem in the basement or crawlspace? [No][8]

Further, page five of the Seller's Disclosure Form provides: "[i]f you have indicated there is a problem with any of the items on pages 1 through 5, please provide a detailed explanation below or on additional sheets."[9] With respect to question 57 and 103[10], the Pineaults answered: "[d]ue to hurricane [and] power loss to sump pump added…generator."[11]

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[7] Joint Exhibit, Tab # 2.
[8] Joint Exhibit, Tab # 2.
[9] Joint Exhibit, Tab # 2.
[10] Question 103 asks whether there have been any additions to the electrical system in the home. The Pineaults responded "Yes" to this question.
[11] Joint Exhibit, Tab # 2.

Mr. Pineault testified that he prepared the Seller's disclosure form together with his real estate agent. He stated that, at the time he prepared the Seller's disclosure form, he believed that all the disclosures in the form were accurate. Mrs. Pineault admitted that, even though she signed the Seller's Disclosure Form, she never reviewed it before signing. Mrs. Pineault explained that "[t]here were things [Mr. Pineault] handled and there were things that I handled…if I signed it I must have looked at it, but I doubt I looked at it."

Juliet Wu ("Ms. Wu") testified during Mr. Ma and Ms. Wang's case in chief. Ms. Wu was Mr. Ma and Ms. Wang's real estate agent. Ms. Wu testified that it is her understanding that the Pineault's did not disclose any water issues when they completed the Seller's Disclosure Form on September 7, 2009. Ms. Wu testified that when she received the Seller's Disclosure she delivered the document to Mr. Ma and Ms. Wang, telling them that she could answer any questions they might have concerning this document.

On September 21, 2009, Mr. Ma and Ms. Wu signed the Seller's Disclosure Form, acknowledging the following:

> I am relying upon the above Report and statements within the Agreement of Sale as a representation of the condition of property, and not relying upon any other information about the property. I have carefully inspected the property. I acknowledge that Agents are not experts at detecting or repairing physical defects in property. I understand there may be areas of the property of which Seller has no knowledge and this Report does not encompass those areas…I may negotiate in my Agreement of Sale for other professional advice and/or inspections of the property…This is a legally binding document. If not understood, consult an attorney.[12]

On September 27, 2009, the parties signed the Agreement of Sale for 104 Clear Creek Drive (the "Agreement").[13] The Agreement provided that the purchase price for 104 Clear Creek

[12] Joint Exhibit, Tab # 2, Ma 21.
[13] Joint Exhibit, Tab # 1.

was $390,000.00.[14] The Agreement contained a home inspection contingency clause.[15] This clause reads as follows, in pertinent part:

> If "Yes" is indicated above, this Agreement is contingent upon Buyer obtaining a home inspection of the property and written report…, by a home inspection company and/or licensed contractor/professional of Buyer's choice at Buyer's expense. If Buyer does not choose to obtain an inspection, or if major defects are not reported to the Seller by date specified, then Buyer has waived the Home Inspection contingency.
>
> If the home inspection or any subsequent inspection discovers major defects, Buyer shall provide Seller with a written request for repairs and a copy of the relevant portions of the Inspection report. Any subsequent inspections necessitated by the initial inspection shall be at the direction and expense of Buyer,…performed by a licensed contractor/professional, and completed within the time frames provided herein…Buyer and Seller agree that Broker(s) does not guarantee, and will not be held responsible for, any person or company performing the inspection or correction of any condition pursuant to the terms of this Agreement and shall not be responsible for the selection of any person or company chosen to perform an inspection or correct any condition.[16]

Additionally, Section 31 of the Agreement specifically incorporates the Seller's Disclosure Form into the contract.[17]

c. The First Home Inspection and Amendments to the Seller's Disclosure Form.

On October 3, 2009, Reliable Home Inspection Service ("Reliable") inspected 104 Clear Creek Drive.[18] Paul Duhamel ("Mr. Duhamel") was the Reliable inspector. Mr. Duhamel took photographs and prepared a report based on his findings during the inspection.

The Reliable Home Inspection Report was delivered to Mr. Ma and Ms. Wang. The written Reliable Home Inspection report revealed the following problems related to water in the home:

[14] Joint Exhibit, Tab # 1, Ma 7.
[15] Joint Exhibit, Tab # 1.
[16] Joint Exhibit, Tab # 1, Ma 11.
[17] Joint Exhibit, Tab # 1, Ma 13.
[18] Joint Exhibit, Tab # 4.

Page 1 of 8.

Major Defect[19]; Exterior; Masonry Walls: Signs of leaking and water retention at front wall. Entire condition of stucco wall should be evaluated by a qualified stucco inspector/contractor or engineer and all needed repairs made including any needed repairs to correct grading at this area. (Infrared evaluation may be necessary). To note it could not be determined if this condition exists at the finished basement portion – ceiling in place.

Major Defect; Exterior; Basement; Basement Foundation Walls: Some cracks and water penetration. Active water penetration should be repaired.[20]

Page 2 of 8.

Major Defect; Basement Ceiling Joist: Active water penetration and wood rot noted, entire structural condition should be evaluated by a structural contractor or engineer and any needed repairs made.

Page 3 of 8.

Safety Concern[21]; Basement; Basement: As found in most homes in America, possible mold/mildew noted, and should be evaluated/cleaned by qualified personnel. As mold and mildew are not part of the home inspection the client may decide to do further evaluation to determine the extent of the problem and the cost to cleanup/repair.

Page 4 of 8.
Service/Repair[22]; Exterior; Grading: Soil should be sloped away from house to improve drainage. The addition of window well covers is recommended – (keep window wells covered). Trim Work: Some loose paint and wood rot noted.

Page 6 of 8.

Service/Repair; Crawl Space; Crawl Space Foundation Walls: Some cracks and water penetration noted.
…

[19] The report at page 8 defines the term "Major Defect" as "[a]n item that will require immediate maintenance and should be carefully monitored to avoid larger problems." Joint Exhibit # 4.
[20] Note that this particular portion of the Reliable Report relating to water damage is related to a pipe that protruded from the basement wall that is unrelated to the cause of the damage at issue in this case.
[21] The report at page 8 defines the term "Safety Concern" as "[a]n item that affects the safety of the occupants of the home, and is in need of immediate repair."
[22] The report defines "Service/Repair" as "[a]n item in need of repair or maintenance, the expected cost of which should be at a level less than that of a major defect, at the time of inspection. Also noted, may be some inaccessible items or items not working."

> Monitor/Maintain; Gutters…; Runoff Drains: Downspouts and runoff drains should be extended in such a way as to move water away from the foundation wall.
> …
>
> Roof…; Flashing; Other = Cracked neoprene flashing noted at plumbing vent pipe should be sealed or otherwise repaired.
>
> Page 7 of 8.
>
> Inspection Definition/Limitation…; Basement; Basement Insulation: Insulation limits inspection. Basement Wall Finish: Inspection limited by finished areas and stored belongings.[23]

Moreover, the Reliable Home Inspection Report contained a lengthy disclaimer, which provides in pertinent part:

> Home inspectors are generalist and are not experts in any specific field, and further evaluations are often needed. Qualified experts should be chosen carefully, and should be allowed to thoroughly inspect the entire suspect system and not be limited to specific areas sighted in the home inspection…It is not possible to be exact, but an effort is made to be as accurate as possible based on visible evidence where accessible…Please read the information printed on each page and call us for an explanation of any aspect of the report that you do not fully understand…The "Whole House Inspection" is conducted according to the standards set by The American Society of Home Inspectors (ASHI) for the purpose of identifying major deficiencies that might effect your decision whether to purchase. Unfortunately we cannot take away all the risks of home ownership. Although Service/Repair items may be mentioned, this report does not attempt to list them all…*Your home inspector is not a licensed structural engineer or other contractor whose license authorizes the rendering of a technical analysis of the structural integrity of a building or its other component parts. You may be advised to seek a licensed engineer or contractor's opinion as to any defects or concerns mentioned in this report.*…Home buyers, after occupying the home, sometimes overlook important information and warnings contained in their reports. This can result in failure of equipment or other damage, which could have been prevented if the inspector's advice, and recommendations had been followed.[24]

Attached to the Reliable Home Inspection Report is an additional fourteen page document titled "Inspection Report Details." In this document, Duhamel again noted the

[23] Joint Exhibit Tab # 4.
[24] Joint Exhibit, Tab # 4 (emphasis added).

following issues, complete with accompanying explanations identical to the explanations provided in pages one through eight of the report: (1) listing the front stucco/masonry wall as containing a "major defect" with "signs of leaking and water retention;" (2) listing wood rot on the "trim work;" (3) recommending that the downspouts and runoff drains be extended to remove water away from the foundation wall; (4) noting that near the plumbing vent pipe on the roof the neoprene flashing was cracked and should be repaired and re-caulked; (5) noting mold and mildew issues in the basement; (6) noting cracks and "active water penetration" as a "major defect" in the basement foundation walls; (7) noting "active water penetration and wood rot" in the basement ceiling joist and recommending that the "entire structural condition should be evaluated by a structural contractor or engineer and any needed repairs made;" (8) noting that insulation and stored belongings limited the scope of the inspection performed in the basement; (9) noting mold/mildew, cracks, and water penetration in the crawl space foundation walls; and (10) again restating the definitions and disclaimer portion in its entirety.[25]

Moreover, the Reliable Home Inspection Report included numerous photographs of the portions of the home referenced in the Report. In the section listing the "Basement Ceiling Joist" as a "Major Defect" there are three photographs of the portion of the basement ceiling immediately below the front door and front facing exterior wall of the home.[26] Portions of the concrete basement ceiling are visible beneath the ceiling and wooded basement ceiling joist.[27] There are numerous plainly visible dark water stains on the concrete walls, and plainly visible dark patches of mold on the wooden ceiling joist.[28] In the portion of the report listing the mold in the basement as a safety concern, there is another picture of a different portion of the basement

[25] Joint Exhibit, Tab # 4, Inspection Report Details, Pages 1-14.
[26] Joint Exhibit, Tab # 4, Page 2.
[27] Joint Exhibit, Tab # 4, Page 2.
[28] Joint Exhibit, Tab # 4, Page 2.

ceiling joist.[29] In this picture there are numerous water stains on the concrete walls immediately below the wooden ceiling joist and dark patches of mold on the ceiling joist itself.[30] On cross examination, Mr. Ma admitted that he observed these stains during Mr. Duhammels inspection. Mr. Ma further testified that he asked Mr. Pineault about these stains, and Mr. Pineault told Mr. Ma that the stains had been on the wall for years. In other words, Mr. Pineault represented that the stains were not evidence of current water leakage issues.

Ms. Wu testified that she knew that the Reliable Home Inspection Report had identified water issues in the home. Ms. Wu testified further that she was present during Mr. Duhamel's inspection and "saw moisture in the basement" at that time. Ms. Wu testified, however, that she was not concerned when she saw active moisture in the basement because Mr. Pineault was also present and told Ms. Wu that the basement was dry.

Mr. Pineault testified that after receiving the home inspection report, the Pineaults updated the Seller's Disclosure Form based on the recommendation of their real estate agent. Specifically, the Pineaults updated the questions 51 and 66 as follows[31]:

> 51. Have you made any additions or structural changes? Noticed after we purchased the home ten years ago that the right side dining room windows were leaking onto the basement wall from the sill plat area. Called the builder, who sent repairmen to correct the problem. The area has remained dry to current date.
>
> * In the summer of 2008 we had all the windows caulked, sealed and painted the stucco and replaced all of the shutters.
>
> * On 4/24/09 we had all of gutters replaced by the gutter guys.
> …

[29] Joint Exhibit, Tab # 4, Page 3.
[30] Joint Exhibit, Tab # 4, Page 3.
[31] The Joint Exhibit binder contains the original Seller's Disclosure Form at Tab # 2, and the Amended Seller's Disclosure Form at Tab # 3. However, Tab # 3 contains only updated explanations for questions 51 and 66, not a full copy of the Amended Seller's Disclosure Form.

> 66. Is there any water leakage, accumulation, or dampness within the basement or crawlspace? 2005 addition to family was added. Portico was added to front of house by Prestige Home Improvement. New front door was installed by Lowes.

On cross examination, Mr. Pineault admitted that he did not disclose that the carpeting and padding had been replaced by the builder. He explained that he did not disclose this information because the Pineaults did not replace the carpet themselves. Mr. Pineault also admitted that at the time he completed the original and amended seller's disclosure forms, he knew that there was water damaged wood in the foyer near the front door, and that he did not disclose this information. Mrs. Pineault testified similarly that at the time Mr. Pineault completed the Seller's Disclosure Form and Amendment, she knew that there was water damaged wood in the foyer. Finally, Mr. Pineault testified that, before amending the Seller's Disclosure form, he and his realtor, Jill Kovak (Ms. Kovak"), had climbed a ladder, felt the basement ceiling joist, and that it was not wet.

Mr. Pineault testified that his explanation to question 51, that the Pineaults noticed that the right side dining room windows were leaking down into the basement and further, that the builder had repaired this issue, was not accurate. Mr. Pineault testified that he never saw water leaking in these windows. Mr. Pineault further testified that the builder told him that there might be an issue, and that the builder then sent a repairman to make this repair.

Mrs. Pineault also testified that the explanation to question 51 was not accurate, because she never observed the dining room windows leaking during the time the Pineaults owned the home. Mrs. Pineault did, however, admit that the basement walls had some water stains and that the basement ceiling joist was water stained and moldy during the time the Pineaults lived in the home.[32] She further testified that she never noticed active water leaking in the basement, or

[32] Joint Exhibit, Tab # 9, Ma 105-06.

water stains under any of the window sills in the home. Mrs. Pineault testified adamantly, that had she noticed any water issues in the home, she would have had them repaired.

Mr. Ma testified that he was present during Mr. Duhamel's inspection, and that he had read the Reliable Home Inspection Report. Mr. Ma stated that Mr. Duhamel noted that there was insulation missing in the basement ceiling, and that the area around the basement ceiling joist of the front wall to the house was wet to the touch. On cross examination Mr. Ma stated that during Mr. Duhamel's inspection he did not personally touch the basement ceiling joist, but rather, Mr. Duhamel told Mr. Ma that it was wet. Mr. Pineault stated that during Mr. Duhamel's inspection Mr. Pineault told Mr. Ma that he had removed the insulation covering this area to monitor the area for termites. Mr. Ma also admitted that during Mr. Duhamel's inspection, Mr. Ma had seen a water damaged piece of wood in the foyer.[33]

d. The Second Home Inspection, Subsequent Pre-Sale Repairs, and Closing.

Mr. Ma testified that he hired Silverside Structurals, Inc. to perform a follow up inspection based on the water issues in the stucco front wall of the home, the basement wall, and the basement ceiling joist that were discovered by Mr. Duhamel and discussed at length in the Reliable Home Inspection Report. Mr. Ma testified that he hired Silverside Structurals, Inc. upon the recommendation of Ms. Wu. Mr. Ma paid Silverside Structurals, Inc. $85.00 for this inspection.[34] Mr. Ma testified that Richard Hartnett ("Mr. Hartnett") was the Silverside Structurals, Inc. employee that had actually performed the inspection and prepared a written report.[35]

Mr. Hartnett testified during plaintiff's case in chief that he was the President of Silverside Structurals, Inc for approximately two or three years. He testified that he has

[33] Joint Exhibit, Tab # 9, Ma 102.
[34] Joint Exhibit, Tab # 5.
[35] Joint Exhibit, Tab # 5.

approximately thirty years experience conducting "structural evaluations." He said that on October 12, 2009, he inspected 104 Clear Creek Drive at Ms. Wu's request. She asked Mr. Hartnett to evaluate water stains on the front wall of the home. Mr. Hartnett testified that he inspected the walls and recommended that the shutters be removed, re-caulked, and that any cracks be sealed.

Mr. Hartnett stated that he did not recall whether any insulation was missing in the basement, or whether missing insulation was discussed with Mr. Pineault. He also could not recall whether Mr. Pineault said anything about termites during the inspection.

Mr. Hartnett testified that he reviewed the Reliable Home Inspection Report before performing his inspection. He admitted that he is not an engineer, but testified that he is qualified to perform structural analyses. He stated that he could not recall whether the basement walls were stained when he performed his inspection, and admitted that he did not include anything about stains on the basement walls in the written report. Mr. Hartnett admitted on cross examination that neither Mr. Ma nor Ms. Wu had asked him to perform a "structural analysis" of the stucco front wall of the home.

Mr. Ma testified that he was present for Mr. Hartnett's inspection and that Ms. Wu and Mr. Pineault were also present. Mr. Ma stated that on the day of Mr. Hartnett's inspection, it was not raining or snowing outside. He said that they all went into the basement of the home, where Mr. Hartnett examined the ceiling, basement ceiling joist, and basement walls that Mr. Duhamel had referenced in his report. He said that Mr. Hartnett also examined the stucco front wall of the home from the outside of the home.

Mr. Ma testified that Mr. Pineault told everyone present that there was a water leak in the home after the Pineaults moved in. However, he said that Mr. Pineault assured everyone present

that when the Pineaults discovered these issues, they contacted the builder, who repaired the water issues, and that the home had been dry ever since. Mr. Ma testified that he noticed that an area of insulation was missing in the basement ceiling. Mr. Ma said that Mr. Pineault offered no explanation for why the insulation was missing and that Mr. Pineault never mentioned termites.

Ms. Wu testified that Mr. Hartnett, Ms. Wu, and Mr. Ma all asked Mr. Pineault about past leakage and water problems while the group was in the basement. Ms. Wu testified that Mr. Pineault said that there was a water problem in the dining room ten years earlier, but the realtor had repaired the problem and that the Pinaults had not experienced any issues with water since then. Ms. Wu said that Mr. Pineault specifically told them that he exercised in the basement everyday and had never seen any water on the basement walls. Ms. Wu also said that during the time the group was in the basement, Mr. Pineault had never mentioned termites. She thought that nothing was said about termites because "we were there for water." Ms. Wu later testified on cross examination that Mr. Pineault told them that he had removed the insulation in the ceiling because he knew that there had previously been water problems in that area, and he wanted to monitor the area for water issues.

After inspecting the home for water damage and continuing water issues in the stucco front wall, basement ceiling joist, and basement wall, Mr. Hartnett prepared a one page report listing his findings. The one page report provides as follows:

Re: Water stains – front wall of basement

- It is my opinion that at some time, water has penetrated the front wall above ground level.
- The present owners have reported that the water problem was corrected at the front window.
- Some of sealant around the windows may have deteriorated over a period of time.

- I suggest removing the shutters and resealing around the window.[36]
- Note some water may have penetrated the wall at other locations.
- I cannot guarantee that the above suggestions will stop all water penetration.

A **"good faith"** estimate to remove the shutters and caulk is…**$300.00**.

Total inspection service call to be paid by the responsible party is..[.]$85.00.[37]

Mr. Ma testified that Mr. Hartnett told him after the inspection, that if the problems were corrected as recommended, that he should buy the home. Mr. Hartnett performed these repairs prior to closing.

Mr. Ma testified that during Mr. Hartnett's inspection, Mrs. Pineault told him that the Pineaults were selling the home was because they were having financial difficulties. Mrs. Pineault denied making this statement. Mrs. Pineault instead testified that Mr. Harnett was scheduled to arrive for the inspection at 8:00 AM, and she was told that the inspection would last between two and three hours. She stated that she left the property from 8:00 AM until 12:00 PM to allow for the inspection.

On cross examination, Mr. Ma admitted that Mr. Duhamel recommended both orally and in the Reliable Home Inspection Report that Mr. Ma have a "qualified stucco inspector/contractor or engineer" inspect the structural integrity of the front wall of the home. Mr. Ma stated that he did not think that this inspector was required to be an engineer, and that he relied on Ms. Wu to select a suitable expert to perform the recommended inspection. He said that Ms. Wu represented to him that Mr. Hartnett was an expert in stucco. Mr. Ma admitted that Mr. Hartnett was not an engineer, and that he never instructed Mr. Hartnett to look inside the front wall of the home to determine the extent of the water damage inside the wall. Mr. Ma also admitted that the Pineaults never limited the scope of either inspection and never specifically

[36] Mr. Ma testified that it is his understanding that Mr. Hartnett was referring to the dining room windows in this line of the report.
[37] Joint Exhibit, Tab # 5.

said that Mr. Hartnett could not look inside the walls. Moreover, Mr. Ma conceded that he should have hired someone more qualified to properly examine the structural integrity of the stucco front wall, basement wall, and basement ceiling joist.

Mr. Pineault testified that he, Mr. Ma, Ms. Wu, and Ms. Kovak were all present during the second inspection. Further, during the time the group was in the basement, neither Mr. Ma nor Mr. Hartnett directly asked Mr. Pineault about water, and he never said anything about water leaks in the front windows. Notwithstanding the issues with water discovered both by Mr. Duhamel and Mr. Hartnett, Ms. Wu testified that, after Mr. Hartnett's inspection she, Mr. Ma, and Ms. Wang felt comfortable going forward with the sale because they "trusted the seller's words." Closing was held on November 16, 2009.

e. Water Problems in the Home after the Sale.

Mr. Ma testified that after he purchased the home, he wanted to repair and renovate the home before he and Ms. Wang moved in. Starting on December 7, 2009, Mr. Ma took several weeks off from work to perform the desired renovations. He stated that the carpet in the living and dining rooms was "old and not clean," so he wanted to tear the carpet up and install hardwood floors in the living room, dining room, and foyer. Mr. Ma had decided to do this work himself.

Mr. Ma did not begin to work on the floors until around December 22, 2009, because he was performing other renovations. He testified that, when he began removing the old hardwood floor in the foyer he discovered that the sub flooring beneath the hardwood was heavily stained, moldy, and rotted.[38] When he removed the carpeting from the dining and living rooms, the sub flooring beneath the windows in these rooms was heavily stained, moldy, and rotted. Mr. Ma testified further that the underside of the carpeting and the padding was heavily stained and

[38] Joint Exhibit, Tab 9, Ma 103.

moldy. Mr. Ma testified that it was not raining on December 22, 2009 when he performed this work. However, on cross examination, Mr. Ma admitted that there was a snowstorm at some time prior to that date. On cross-examination, Mr. Ma admitted that there were no visible stains on the top side of the carpet.

As soon as Mr. Ma discovered these issues in the foyer, living room, and dining room, he called Ms. Wu. Mr. Ma testified that on December 23, 2009, Ms. Wu, Mr. Duhamel, and Gary Willow ("Mr. Willow"), a roofer Ms. Wu knew, inspected the home at 12:00 PM. It was not raining at this time. They looked at the sub flooring, and Mr. Willow suggested that Mr. Ma call a contractor.

Mr. Ma testified that Ms. Wu put her ear against the sub floor and told Mr. Ma that she could hear water "gurgling." Ms. Wu testified that the floors were moldy and wet, and that she "could feel water dripping in the foyer." Mr. Ma called Stephen C. Green ("Mr. Green") at Mr. Willow's recommendation.

On December 24, 2009, Mr. Green and Mr. Willow returned to the home and conducted an inspection. Mr. Green said he needed to explore inside the walls to determine the scope of the water problem. Mr. Green gave Mr. Ma a quote for the estimated cost of the work, which Mr. Ma accepted.

On December 26, 2009, Mr. Green came back to the home and removed most of the drywall from the living room, dining room, and foyer. It was raining moderately at the time. Mr. Ma testified that while it was raining, he went into the basement and observed water dripping down from the basement ceiling joist to the basement wall.[39] Mr. Ma testified that once Mr. Green removed the drywall and remainder of the sub flooring, he realized that he did not have the expertise to properly complete the work and recommended that Mr. Ma contact a structural

[39] Joint Exhibit, Tab # 9, Ma 105-06.

engineer. Mr. Green recommended, and ultimately contacted an engineer, Bjorn Haglund ("Mr. Haglund"), to inspect the home.

Mr. Green testified that he is a licensed general contractor specializing in remodeling and rehabilitation. When he arrived at the home, Mr. Ma had removed all the carpeting from the living room and dining room, and all the hardwood from the foyer. He said that he observed substantial water damage on each of these surfaces. Mr. Green testified that there were water stains on the drywall below the window sills in the dining room.

Mr. Green removed most of the drywall from the walls in these rooms. Mr. Green testified he found that there was particle board underneath the drywall. He testified that this particle board was so badly water damaged that it crumbled when touched. He said specifically that when he reached inside the wall, he easily pulled out handfuls crumbled particle board similar in texture to sawdust.

Mr. Green said when he removed the drywall it was not raining. Further, that before he removed the drywall, he instructed one of his employees to spray the living room and dining room windows with a hose to determine whether the windows were the cause of the leak. He testified that when this employee sprayed the point where the window and stucco wall meet, the drywall inside the home became visibly wet and that the foyer smelled musty. Mr. Green also indicated that when he went into the basement he could see dark water stains on the ceiling joist, and that it also smelled musty.

On cross examination, Mr. Green was asked to identify the photographs in the Joint Exhibit Binder that reflected water leaking or water damage that would have been visible before Mr. Ma removed the hardwood in the foyer and the carpeting in the dining and living rooms, and before Mr. Green removed the drywall in these rooms. Mr. Green responded that there were four

photographs in this binder displaying this damage. Specifically, he indicated that the water damaged wood near the front door would have been visible[40], the water stains on the basement walls would also have been visible[41], and that there was a hole in the stucco wall on the side of the house where the gutter and roof met[42].

Mr. Green testified that, had Mr. Ma and Ms. Wang hired him to inspect the structural integrity of the stucco front wall, the basement ceiling joist, and the foundation before closing, the only way he could have performed this inspection would have required removing portions of drywall. Mr. Green explained, however, that it would not have been difficult to perform this type of inspection.

Finally, Mr. Green discussed the visible hole in the side of the stucco wall near where the gutter and roof met.[43] Mr. Green testified that he observed water "pouring in" through this hole. Mr. Green testified that the worst deterioration inside the front stucco wall of the home was near this hole. Mr. Green said that this defect was attributable to a "bad stucco job", and opined that the home inspector should have found this hole during the course of the home inspection.

Further, Mr. Green testified that, in his opinion, many of the Pineault's home improvement projects were done to conceal and repair known water issues. Also, that front doors on homes do not need to be replaced until they are at least ten years old. He further opined that the portico and caulking under the shutters was done to prevent water leaks. Finally, that the stucco front of the home was re-painted to conceal water stains. On cross examination, Mr. Green admitted that the new door was a "real upgrade" over the door originally installed in the home, and that homeowners often install porticos for aesthetic reasons.

[40] Joint Exhibit, Tab # 9, Ma 102.
[41] Joint Exhibit, Tab # 9, Ma 105b, Ma 106a.
[42] Joint Exhibit, Tab # 9, Ma 113.
[43] Joint Exhibit, Tab # 9, Ma 113.

Mr. Haglund testified that he is a registered professional structural engineer in Delaware and that he has been working in this capacity since 1996.[44] On January 8, 2009 he performed a structural evaluation of 104 Clear Creek at Mr. Green at Mr. Ma's request. Upon arrival, Mr. Ma had already removed the flooring and carpeting in the foyer, dining room, and living room, and that Mr. Green had already removed most of the drywall in these rooms. Mr. Haglund testified that the wood that was exposed was in a "later decay stage," meaning that water damage had been occurring in the home for an extended period of time.[45] He said that more than fifty percent of the wood was damaged, expanding, and falling apart.[46] Further, that the damaged wood was wet to the touch, although it was not raining that day. Mr. Haglund indicated that the stains were primarily located under and around the eight windows in the living room and dining room, and under and around the front door. Also, that when he began his investigation, there were some windows in the front two rooms of the home still covered with drywall. There were water stains and cracking visible on the drywall covering these windows and that when he removed the drywall from these previously unopened windows, he discovered more decomposed particle board.

Mr. Haglund also testified that there were also water stains running down the face of the basement wall immediately below the front door. And, that this staining reflected both new and old staining, because the stains were varied in color.[47]

Mr. Haglund opined that the cause of the window leaks was that the builder had not installed proper "flashing" in between the stucco front wall and the eight front windows, front door, and the picture window.

[44] The parties stipulated that Mr. Haglund is an expert in engineering.
[45] Plaintiff's Exhibit # 2.
[46] Plaintiff's Exhibit # 2.
[47] Plaintiff's Exhibit # 2.

Mr. Haglund testified that, based on his investigation, he recommended that several repairs be performed. He recommended that all the rotten wood be replaced, all the drywall behind the front wall of the home be replaced, and a new stucco front wall be installed, complete with proper flashing around the windows.

Mr. Haglund stated his awareness of the various upgrades and repairs to the home performed by the Pineaults and that, in his opinion, these projects were undertaken to repair a known water problem in the home. Mr. Haglund said that replacing gutters, installing porticos, re-caulking windows, and replacing front doors are all things that are typically done when homeowners know that there is a water problem and wish to correct it. On cross examination, Mr. Haglund admitted that porticos are often installed for aesthetic reasons. Mr. Haglund also admitted that the Pineaults had the windows re-caulked for the first time when the home was ten years old, and that exterior window caulk generally needs to be reapplied every ten years.

Mr. Haglund testified that he is a former United States Marine, where he had served on a helicopter squadron for three years. Mr. Haglund testified that he is very familiar with "rotor wash," a technical term used to describe the wind blown by helicopter propellers. Based on his training and experience as an engineer and a Marine, he feels the Pineault's story that the helicopter blew the gutters off of the house is not plausible. On cross examination, however, Mr. Haglund admitted that gutters frequently become loose, and that if the gutters were loose when the helicopter landed, the rotor wash caused by the helicopter could have been strong enough to dislodge the gutters from the home.

Also on cross examination, Mr. Haglund testified that the only damage he personally observed that would have been visible to the Pineaults was the water staining and mold on the

basement ceiling joist, the water stains on the basement wall, and the water stains below the windows that were unopened when he performed his investigation.

f. Repairs and Restoration.

Mr. Ma testified that he hired Mr. Green to perform the repairs recommended by Mr. Haglund. Mr. Ma signed a contract[48] to formally hire Mr. Green on April 6, 2010, but that Mr. Green actually started working on April 17, 2010. He stated that Mr. Green completed the work on June 22, 2010. Mr. Ma testified that he has incurred the following expenses in connection with these repairs:

- $ 2,440.00 paid to Mr. Green for demolition and exploratory work, based on an invoice dated December 28, 2009.[49]
- $ 23,612.81 paid to Mr. Green for different stages of the repair work.[50]
- $6,205.00 paid to Home Depot for the purchase and installation of new windows in the dining room, living room, and the second floor above these rooms[51]
- $720.00 paid to Mr. Haglund for his investigation and recommendations.[52]

The total amount sought based on these documents is $32,977.81.

III. Discussion

a. The Pineaults Liability for Breach of Contract

"[A] seller transferring residential real property shall disclose, in writing, to the buyer…all material defects of that property that are known at the time the property is offered for sale or that are known prior to the time of final settlement"[53] Oral disclosures, while helpful, do

[48] Joint Exhibit, Tab # 7.
[49] Joint Exhibit, Tab # 7, Ma 60.
[50] Joint Exhibit, Tab # 7, Ma 61.
[51] Joint Exhibit, Tab # 7, Ma 67. Mr. Haglund testified that there was water damage in the wood surrounding the second floor windows similar to the damage surrounding the windows in the dining room and living room, and necessitating similar repairs.
[52] Joint Exhibit, Tab # 7, Ma 68.
[53] 6 *Del. C.* § 2572(a).

not relieve the seller of residential real estate from their statutory duty to disclose all known material defects in writing.[54] Sellers have a continuing duty to update their disclosure forms to reflect any and all material changes up to the date of final settlement.[55] This required seller's disclosure is intended to be a good faith effort by the seller to disclose known defects, and is not a substitute for warranties or inspection.[56] This requirement was further intended to eliminate the doctrine of "caveat emptor," or "let the buyer beware" from residential real estate sales in Delaware.[57]

Once the Seller's Disclosure Form is signed by both the buyer and seller, the form becomes a part of the contract.[58] Accordingly, failure to disclose known material defects qualifies as a breach of the real estate sale contract by the seller.[59] In a civil action for breach of contract, the burden of proof is on the plaintiff to prove the claim by a preponderance of the evidence.[60] To prove a claim for breach of contract by a preponderance of the evidence, the plaintiff must establish the following: (1) the existence of a contract; (2) the defendant breached an obligation imposed by the contract; and (3) resulting damages to the plaintiff.[61]

The implied covenant of good faith and fair dealing is not an independent cause of action.[62] Rather, the implied covenant of good faith and fair dealing is subsumed within every contract and operates to preclude a party from avoiding a contractual undertaking by invoking a condition in the contract, if the condition occurred as a result of the party's own actions.[63] "[P]arties are liable for breaching the covenant when their conduct frustrates the "overarching

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[54] *McCoy v. Cox*, 2007 WL 1677536, *1 (Del. Super. June 4, 2007).
[55] 6 *Del. C.* § 2572(b).
[56] 6 *Del. C.* § 2574.
[57] *Iacono v. Barici*, 2006 WL 3844298, *4 (Del. Super. Dec 29, 2006) (citations omitted).
[58] *McCoy*, 2007 WL 1677536 at *1.
[59] *Id.*
[60] *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513, 545 (Del. Super. 2005).
[61] *VLIW Technology, LLC v. Hewlett-Packard Co. STMicroelectronics, Inc.*, 840 A.2d 606, 612 (Del. 2003).
[62] *McCoy*, 2007 WL 1677536 at *9.
[63] *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1055 (Del. Ch. 1984).

purpose" of the contract by taking advantage of their position to control implementation of the agreement's terms."[64] "Only when it is clear from the writing that the contracting parties 'would have agreed to proscribe the act later complained of ... had they thought to negotiate with respect to that matter' may a party invoke the covenant's protections."[65]

In this case, the parties agree that a contract existed. The Agreement of Sale specifically incorporates the Seller's Disclosure Form into the contract.[66] The parties only dispute whether the Pineaults breached the contract by failing to make the required disclosures. Further, the plaintiffs argue that the Pineaults breached the spirit of the contract for sale by making numerous allegedly misleading written and oral representations before closing.

In *D'Aguiar v. Heisler*, the Court held that a seller of residential real estate breached its contract with the buyer by failing to adequately disclose water and foundation issues in the basement of a residential home.[67] The seller in that case made the following written disclosures: (1) there were small cracks in the basement walls (2) there was past or present leakage, dampness, or accumulation in the basement that the seller corrected by re-routing a down spout,; and (3) at of the time of the sale there was no water leakage, dampness, or accumulation in the basement.[68] At trial, the defendants initially testified consistent with this disclosure, that there were water issues in the basement shortly after they purchased the home that were corrected by re-routing a down spout, and some flooding during a hurricane. However, the sellers then admitted during their testimony at trial that they knew: (1) that water "seeped" through the basement walls shortly before settlement; and (2) there was a large inward "bulge" in one of the

[64] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)
[65] *Id.* (citations omitted).
[66] Joint Exhibit Tab # 1, Ma 13.
[67] *D'Aguiar v. Heisler*, 2011 WL 6951847 (Del. Com. Pl. Dec. 15, 2011).
[68] *Id.* at *10-11.

concrete basement walls.[69] Further, the Court noted that characterizing large cracks that cut through nearly all of the basement walls as "small cracks" did not adequately describe the gravity of what were, in fact, severe, large, and discolored cracks.[70] In other words, the plaintiffs established that the sellers did not disclose all known material defects related to flooding in the basement because they testified at trial that at the time they completed the seller's disclosure form, they were aware of other severe defects, but failed to disclose these defects in writing.

In the instant case, the Pineaults similarly failed to disclose the full extent of their knowledge of the condition of the stucco front wall of the home, the basement ceiling joist, and the basement wall. The initial disclosure form provided that there was: (44) no drainage or flood problems in the property; (53) no problems with the foundation; (54) that the property had never been damaged by flooding; (57) that there was "past or present water leakage in the house," (59) that there had never been any repairs or attempts to control any of the above problems, and (66) that there had never been any water leakage in the basement, or (67) attempts to control water issues in the basement.

The initial disclosures in this case were misleading and inaccurate because the Pineaults only disclosed that there had been leakage in the home, not flooding, and never any leakage in the basement. Despite the fact that page five of the Seller's Disclosure Form requires that the seller explain problems disclosed in the form, the Pineaults made no mention of leaking dining room windows at this time. At trial, the Pineaults testified that when they filled out the Seller's Disclosure Form, they knew that the basement had flooded during a hurricane in 2004, that there were stains on the basement walls from water leaking down these walls, and that the dining room windows leaked at some time. Whether the Court finds that the Pineaults knew about the leaks

[69] *Id.*
[70] *Id.*

in the dining room windows (based on the fact that they disclosed this information in the second disclosure form), or because they later testified at trial that they knew that leaks had occurred and been repaired before they moved in, is immaterial. In either event, the Pineaults knew that there had been a water leak in the dining room windows at some time and did not include that information on the initial disclosure form.

After Mr. Duhamel's inspection revealed numerous water related defects in the home, the Pineaults updated their disclosure form to add: (51) during the time they owned the home, the right side dining room windows leaked down onto the basement wall, but that the Pineaults contacted the builder who corrected the problem. Further, the Pineaults disclosed that in 2008 the stucco was painted, shutters were replaced and windows resealed; disclosed that the gutters were replaced in 2009; and (66) disclosed that they installed a portico and new front door. In other words, after Mr. Duhamel discovered that there might be a severe water issue in the stucco front wall, basement ceiling joist, and basement wall, only then did the Pineaults disclose that they once had a water issue with the dining room windows that was corrected, and that they replaced the front door, gutters, and installed a portico.

The Court finds it very significant that the Pineaults made these disclosures only after numerous defects were revealed in Mr. Duhamel's report. The Pineaults initially completed the Seller's Disclosure Form on September 9, 2009. Given their temporal proximity, there is no reasonable explanation for failing to include that the gutters had been replaced in 2009 and that the stucco front wall had been repaired in 2008. Moreover, the Pineault's updated disclosure failed to include numerous other known water related problems in the home, including the water damaged wood in the foyer, the stains on the basement wall, the water damaged basement ceiling joist, etc. Only after Mr. Duhamel's report did the Pineaults make a comprehensive update of

the Seller's Disclosure Form, disclosing that the dining room windows once leaked, but had been repaired, and listing the stucco and gutter repairs, and the front door/portico additions. Given the Pineaults often vivid descriptions of past events at trial, including the helicopter incident, as well as both Mr. and Mrs. Pineaults' several statements regarding her fixation on being a fastidious housekeeper, the Court finds that the Pineaults were sufficiently knowledgeable to make more detailed, helpful, and accurate disclosures.

In summary, the Pineaults disclosed in writing that there was either past or present water leakage in the home, and that the dining room windows leaked down onto the basement wall, but that this problem was repaired by the builder at an unspecified time. Stated differently, the Pineaults disclosed that there once was a water issue in the home, where the dining room windows leaked down onto the basement wall, but that this issue had been repaired. Further, their disclosure provided that since the time of this repair, there had never been another problem with water in the home. The testimony of others that areas were wet to the touch during inspections and further, that the extent of the damage indicated decay over an extended period, establishes otherwise.

The testimony taken at trial establishes by a preponderance of the evidence that the Pineaults knew that there was a water problem in the stucco front wall, dining room and living room windows, and basement ceiling joist and failed to adequately disclose the extent of their knowledge. At trial, Mr. and Mrs. Pineault made the following admissions that were not reflected in the Seller's Disclosure Form: (1) Mr. Pineault testified that the basement walls were water stained; (2) Mrs. Pineault testified that the basement ceiling joist had large spots of dark mold on it; (3) there was a water damaged piece of wood in the foyer near the front door; and (4) the carpet was replaced in the living room and dining room before the Pineaults purchased the home.

Further, both Mr. Green and Mr. Haglund testified that the drywall underneath the windows in the living room and dining room was water stained. When Mr. Ma pulled up the carpet while attempting to install hardwood floors, the underside of the carpet beneath the windows in the living room and dining room was heavily water stained and moldy. Carpet does not become stained and moldy without being exposed to significant moisture. Given the testimony of several defense witnesses regarding Mrs. Pineaults' cleaning habits, the Court finds it extremely unlikely that Mrs. Pineault never noticed the stained drywall and never observed that the carpet was wet. Nonetheless, the Pineaults never disclosed that the drywall near the windows was stained and cracked, and never disclosed that the carpet near these windows had gotten wet during the time they owned the home. While it is clear that the problems were caused by poor workmanship by the builder and not the actions of the Pineaults, their disclosure was inadequate.

Mr. Green and Mr. Ma testified that on December 26, 2009, about one month after closing, they observed active water leaks on the basement wall. Mr. Pineault testified that he observed this same area was stained before the Pineaults purchased the home. Further, Mr. Green testified that when one of his workers sprayed the living room and dining room windows from the outside of the home with a hose, the drywall inside the home became visibly wet. Ms. Wu testified that she saw "moisture" in the basement during Mr. Duhamel's inspection. Mr. Ma testified that Mr. Duhamel touched the basement ceiling joist during the inspection and said that it was wet to the touch. The Pineaults admitted that they knew there was a water problem in the home before they moved in, and the seller's disclosure form indicates that this problem was corrected after they moved in. It would not be logical for the Court to conclude that the Pineaults knew there was a water problem, had it repaired, never noticed another leak, wet area,

or stain in the home, and then, within one month of plaintiffs moving into the home, Mr. Ma and Mr. Green observed water running down the basement wall, and the drywall in the front windows became visibly wet when the living and dining room windows were sprayed with a hose.

Moreover, the factual record after trial is permeated with evidence that there has been a longstanding, persistent and visible problem with water in 104 Clear Creek since the home was built in 1999. The basement walls were water stained immediately below the basement ceiling joist. The ceiling joist was wet and moldy before settlement. The underside of the carpet under the dining room windows was severely water stained and moldy even though new carpet was installed in these rooms before the Pineaults moved into the home. Mr. Green and Mr. Ma testified that they observed active water leakage down the basement wall one month after settlement. There was a water damaged piece of wood in the foyer. In *D'Aguair*, the Court found failures to disclose based on the seller's admissions during direct and cross examination that he knew there were water problems in the home. In this case, the Pineaults admitted they knew about the moldy ceiling joist, water stained basement walls, and leaking dining room windows, but that they did not disclose this information. The Pineaults contention that they did not notice water issues is further undermined by the visible and substantial symptoms of water damage documented by both Mr. Ma and Mr. Green only one month after settlement.

The Pineaults argued in closing that these issues were visible to Mr. Ma and Ms. Wang prior to settlement, and therefore the plaintiffs should not be permitted to now claim that failure to disclose these issues was breach of contract. For example, Mr. Duhamel indicated that there was an active water leak in the basement ceiling joist and water retention in the front stucco wall in his report. However, Delaware case law is clear that oral disclosures are not sufficient to

absolve sellers of residential real estate from their statutory duty to disclose prior to settlement all known material defects *in writing*.[71] Similarly, whether the buyer independently discovers a defect prior to settlement does not abrogate the seller's statutory duty to disclose all known material defects in writing.[72] The rationale for requiring written disclosures is to remove the doctrine of buyer beware or caveat emptor from residential real estate sales in Delaware.[73] Thus, any water issues or red flags the plaintiffs noticed before settlement are immaterial to the outcome of their breach of contract claim -- because this did not absolve the Pineaults of their statutory duty to disclose all known material defects in writing.

The Court finds the testimony of the Pineaults' other witnesses, Ms. Kolek, Mr. Rizzo and Mr. Smith, not helpful to the Court, for various reasons. For example, Mr. Smith categorically denied meeting Mr. Goldberg or discussing the facts of the case with the Pineaults, even when asked these very questions by Mr. Goldberg, the Pineaults counsel. Whether confused or otherwise on this point, it renders his testimony less than persuasive.

The Pineaults argue that even assuming that they failed to make the required disclosures, they are not liable for breach of contract because Mr. Duhamel's report raised numerous red flags related to water damage in the home, and recommended that the plaintiffs hire a structural engineer or qualified stucco contractor to evaluate the structural integrity of the stucco front wall. The Pineaults argue further that the plaintiffs should have hired someone more qualified than Mr. Hartnett, who charged them $85.00 and performed, what Mr. Ma now concedes, was not an adequate or thorough inspection. In other words, the Pineaults argue that they are not liable for breach of contract because the plaintiffs did not justifiably rely on the information contained in the Seller's Disclosure Form.

[71] *McCoy*, 2007 WL 1677536 at *1.
[72] *Id*. at *6.
[73] *Iacono*, 2006 WL 3844298 at *4.

While this argument is somewhat compelling, it does not dispense with the Pineaults liability for breach of contract in this case. Rather, this argument strikes squarely at the plaintiff's misrepresentation and fraud claims. The elements of the claim of negligent misrepresentation are: "(1) a pecuniary duty to provide accurate information, (2) the supplying of false information, (3) failure to exercise reasonable care in obtaining or communicating information, and (4) *a pecuniary loss caused by justifiable reliance upon the false information*."[74] The Pineaults cited and the Court has considered, a plethora of case law on negligent misrepresentation, misrepresentation, and fraud. However, breach of contract and negligent misrepresentation are two wholly distinct and separate claims. While negligent misrepresentation contains the requirement that the plaintiff justifiably rely on the defendant's false information in entering the transaction at issue, breach of contract contains no such element. In post trial briefing, the Pineaults did not cite any case law, nor did the Court discover during its independent research, any legal precedent where a court inserted an element of detrimental reliance into a breach of contract claim. As such, the fact that the home inspection reports contained red flags does not absolve the Pineaults of liability for their knowing material omissions from their Seller's Disclosure Form.

Accordingly, the Court finds that the Pineaults knew and failed to disclose a known material defect in the Seller's Disclosure Form, i.e., the extent of the water retention and leaking issue in the stucco front wall of the home, the basement ceiling joist, and the basement wall. Consequently, the Plaintiffs Mr. Ma and Ms. Wang, have proven their case by a preponderance of the evidence, and the Pineaults are liable for breach of contract. The Court's analysis thus shifts to damages for breach of contract.

[74] *Darnell v. Myers*, 1998 WL 294012, *5 (Del. Ch. May 27, 1998) (emphasis added).

b. Damages

Mr. Ma's testimony on damages was largely undisputed. Aside from minor suggestion that Mr. Ma did not solicit a competitive bids before he hired Mr. Green to perform the restorative work, the Pineaults made little argument in closing or briefing to rebut the allegations and testimony on damages. The plaintiffs introduced numerous documents indicating that their damages incurred in this case total $32,977.81. These documents established that plaintiffs paid the following sums: (1) $2,440.00 to Mr. Green for demolition and exploratory work[75]; (2) $23,612.81 paid to Mr. Green for the repair work[76]; (3) $6,205.00 paid to the Home Depot for the purchase and installation of the damaged windows[77]; and (4) $720.00 paid to Mr. Haglund for his investigation and recommendations.[78] Therefore, the Court finds that the plaintiffs are entitled to compensatory damages in the amount of $32,977.81.

IV. Conclusion

For the reasons stated in this opinion, the Court finds in favor of the plaintiff on the Complaint against the Pineaults and awards plaintiff damages in the amount of $32,977.81 plus court costs and pre judgment and post judgment interest at the legal rate until fully paid.

IT IS SO ORDERED this 10th day of April, 2012.

/S/ Joseph F. Flickinger III
Joseph F. Flickinger III
Judge

[75] Joint Exhibit, Tab # 7.
[76] Joint Exhibit, Tab # 7, Ma 60.
[77] Joint Exhibit, Tab # 7, Ma 61.
[78] Joint Exhibit, Tab # 7, Ma 67.